Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1194

JACK SHOUSE, DAVID ROMER,
E. A. BAXENDALE, AND ALICE M. BAXENDALE,

Appellants,

v.

PIERCE COUNTY, A political subdivision of the State of Washington, CLAY HUNTINGTON, PATRICK J. GALLAGHER, and GEORGE E. SHERIDAN, County Commissioners,

Appellees.

JURISDICTIONAL STATEMENT

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v.

PIERCE COUNTY, A political subdivision of the State of Washington, CLAY HUNTINGTON, PATRICK J. GALLAGHER, and GEORGE E. SHERIDAN, County Commissioners,

Appellees.

ON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal is taken by Jack Shouse and other plaintiffs from a judgment of dismissal entered on November 7, 1975, in accordance with the Memorandum Opinion dated November 6, 1975, of the District Court of

the United States for the Western District of Washington, sitting as a three-judge statutory court specially envoked by virtue of the provisions 28 U.S.C. § 2281. This statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The judgment of dismissal dated November 7, 1975, the Memorandum Opinion dated November 6, 1975, and the order denying reconsideration dated November 25, 1975, are unreported and are attached hereto as Appendix A. The Opinion of the United States Court of Appeals for the Ninth Circuit dated March 17, 1975, is also included in Appendix A.

JURISDICTION

This action was brought under 28 U.S.C. § 1331, 1343 (3), 2201, 2281; and 42 U.S.C. § 1983 seeking injunctive and other appropriate relief to restrain as unconstitutional the enforcement, operation or execution of state statutes and to redress the deprivation under color of state law, statute, regulation, ordinance, custom and usage of federal constitutional rights. The judgment of the District Court was entered on November 7, 1975, rehearing was denied on November 25, 1975, and notice of appeal was filed in that court on December 24, 1975. The jurisdiction of this court to review the decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustained such jurisdiction in this case: Phoenix v.

Kolodziejski, 399 U.S. 204 (1970).

PRIMARY STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant portions of § 36.94.230, 36.94.240, 4.16.040, 4.16.080, 4.16.130 of the Revised Code of Washington are set forth in Appendix B (A-16 - A-20, infra).

28 U.S.C. § 1253, 1331 (a), 1343 (3), 2201, 2281, and 42 U.S.C. § 1983, are set forth in Appendix C (A-21 - A-24, infra). The Fourteenth Amendment to the Constitution of the United States, Section 1, is set forth in Appendix D (A-25, infra).

QUESTIONS PRESENTED

1. Whether the Washington statutes challenged herein (RCW 36.94.230, .240; (A-16 - A-18, infra) unconstitutionally and unlawfully deny resident but non-land owning appellants the equal protection of the laws guaranteed to them by the Four-

teenth Amendment to the Constitution of the United States in that said statutes permit only owners of real property to divest the action of county commissioners in the formation of a Utility Local Improvement District (ULID).

2. Whether the aforementioned statutes violate the same constitutional provision by weighting a landowner's vote in proportion to the area of land owned and thus constitute a denial of equal protection by diluting the franchise of those who own small parcels.

3. Whether the aforementioned statutes violate the Equal Protection Clause of the Fourteenth Amendment by diluting the franchise of resident citizen landowners by weighing their vote against non-residents and "non-persons" such as corporate and

governmental owners.

4. Whether a state statute of limitations is applicable to a federally created right enforceable only in equity; or, in the alternative, whether the 30-day statute of limitations provided for in RCW 36.94.240 (A-17, infra) is the applicable state statute of limitations; or, in the alternative whether the aformentioned special 30-day statute of limitations, if applicable, violates appellants' constitutional rights guaranteed by the Equal Protection and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

5. Whether this action is barred by laches.

STATEMENT OF THE CASE

Appellants, residents of ULID 73-1, brough this action against Pierce County

and its respective county commissioners to restrain the enforcement, operation or execution of certain state statutes (A-16 - A-18, infra) which permit the creation of a ULID by resolution of county commissioners and further provide for divestiture of jurisdiction to proceed upon a "protest" vote of owners of at least forty per cent of the land area within the proposed ULID.

By operation of the challenge statute non-landowning residents are completely disinfranchised and the votes of landowners are weighed (1) by land area and (2) against non-resident, non-human owners such as corporations and governmental entities. Appellants are composed of both landowners and non-landowning residents. All are United States citizens and

registered voters.

The area in question is suburban to urban in character, has approximately 75,000 residents, and covers about 20,000 acres of land. It is currently unsewered. The ULID was created for the purpose of constructing a sewer system and levying a variety of taxes, including assessments on real property, to underwrite the costs of construction.

Appellants will be affected in important respects by the decision making process which either excluded them completely or discriminated against them in terms of land area of real property ownership. Besides being fundamentally interested in the political decision to create a public utility which will service their homes, apartments, and businesses, they must

necessarily bear their share of the seventy-five million dollar cost of construction and will be affected by environmental changes necessitated by the project as well.

Pierce County Resolution 16500 creating the ULID was passed on June 18, 1973. This action was commenced on September 5, 1973. The defendants were not prejudiced by the date of filing, nor had they changed their position in the interim.

A single District Court Judge initially assigned the case refused to convene a special three-judge court as prayed. This initial determination was appealed and reversed by the United States Court of Appeals Ninth Circuit in an unpublished opinion. (A-1, infra).

Thereafter, the case was tried to a

three-judge court. Judgment of dismissal was entered for the stated reason that the action was barred by the 30-day statute of limitations set forth in RCW 36.94.240 (A-17, A-18, infra). This appeal follows.

THE QUESTIONS ARE SUBSTANTIAL

As stated by the United States Court of Appeals for the Ninth Circuit:

> "The claim in this case falls somewhere in between the claims presented in Phoenix v. Kolodziejski, 399 U.S. 204 (1970), and Sayler Land Co. v. Tulare Water District, 410 U.S. 719 (1973)." (A-1, infra)

The Kolodziejski case involved an Arizona statute restricting the franchise in municipal bond elections to property owners. Sayler permitted the exclusion of non-landowning residents from participation in elections of flood control district directors. Kolodziejski states the general rule that property ownership

prerequisites to participation in the governmental process are presumptively unconstitutional, 399 U.S. 209, while Sayler carves out a narrow exception (but not without three justices in dissent). The District Court in the instant case chose to follow the Sayler precedent even though the Sayler case didn't involve a municipal utility and concerned a land area virtually undeveloped with only 77 residents. The wisdom of this decision presents the basic question of substance. The question is not only important to the 75,000 residents of the affected area, but to the voters all over America who have been similiarly disinfranchised.

The second basic line of constitutional inquiry must necessarily concern the availability of the federal court system

to redress constitutional grievances as outlined above. The District Court chose to apply the 30-day statute of limitations set forth in the very statute under attack and then, by way of dicta, to mechanically apply the doctrine of laches by analogy.

From the outset one should remember that the appellants sought to enforce a right in equity created by the United States Constitution. Whether any state may bind and limit the equitable powers of a federal court by a local statute of limitations itself presents a substantial question. Holmberg v. Ambrecht, 327 U.S. 392 (1945), expressly refused to apply the applicable statute of limitations and held

> "The present case concerns not only a federally created right but a federal right for which the sole remedy is in equity. [citing cases] . . . we do not have the duty of a

> Federal Court, sitting as it were as a court of the state, to approximate as closely as may be state law in order to vindicate without discrimination a right to rise solely from a state. We have the duty of federal courts, sitting as national courts throughout the country to apply their own principles in enforcing an equitable right created by congress. When congress leaves to the Federal Courts the formulation of remedial details, it can hardly expect them to break with historical principles of equity in the enforcement of federally - created equitable rights."

The District Court's only response to Ambrecht was that it didn't involve a statute of limitations specifically made part of the statute under attack. No authority is cited for the proposition that Ambrecht may be so limited and the reasoning inherent in the "distinction" runs contra to the basic considerations underlying the Ambrecht rule. Language about retroactivity in Cipriano v.

Houma, 395 U.S. 701, 706 (1969) and Kolodziejski, supra, serve only to limit the effect of those particular decisions to actions which could be commenced under the existing state statute of limitation rather than abandoning the general rule as set forth in Ambrecht. An invasion of the traditional equitable domain of the federal court by state legislation limiting access to federal equitable remedies raises questions of substance and import.

Moreover, the subject special statute of limitations is, in itself, subject to constitutional challenge. The general statutes of limitation in Washington are either three years (A-19, infra), six years (A-18, infra) or, where no other statute applies, two years (A-19, A-20, infra). This statute, in essence,

arbitrarily makes a special class of defendants (i.e., local governmental units) immune from claims which would otherwise lawfully be made against all other defendants under the general statutes of limitation.

Statutory classifications which substantially burden the exercise of rights as to some individuals, but not others, are permissible under the Equal Protection Clause of the Fourteenth Amendment only if they are

> "Reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relevance to the object of the legislation, so that all persons similarily circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

CONCLUSION

No one concern is greater to a democra-

tic people than the availability of the franchise. The simple axion of "one man, one vote" stands at loggerheads with the governmental discrimination based on property ownership. The case at bar raises substantial and important questions in an area of the law marked by opposing signposts.

A second basic inquiry concerns the access to the federal court in the first instance. May an individual state curtail the enforcement of a federally created right, in equity, in federal court - and discriminate in favor of local governmental defendants at the same time?

The case merits briefing in depth and a hearing on the merits.

Respectfully submitted,

RICHARD B. SANDERS
Attorney for Appellants

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK SHOUSE, DAVID ROMER, E. A. BAXENDALE, AND ALICE M. BAXENDALE,	No. 74-2660
Plaintiffs-Appellants,	Memorandum
vs.	
PIERCE COUNTY, a political subdivision of the State of Washington, et al.,	
Defendants-Appellees.	

[March 17, 1975]

On Appeal from the United States District Court for the Western District of Washington

Before: CHAMBERS, DUNIWAY and CHOY, Circuit Judges.

The claim in this case falls somewhere in between the claims presented in Phoenix v. Kolodziejski, 399 U.S. 204 (1970),and Sayler Land Co. v. Tulare Water District, 410 U.S. 719 (1973). We cannot say that the claim is an insubstantial one under the test enunciated in

Goosby v. Osser, 409 U.S. 512 (1973). A three-judge district court should be convened to consider the claim. Remanded for proceedings consistent herewith.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACK SHOUSE, et al.,)
) No. 165-73C3
Plaintiffs,)
)
v.)
)
PIERCE COUNTY, et al.,)
)
Defendants.)

Before: KILKENNY, Circuit Judge, and
BOWEN and BEEKS, District Judges

O P I N I O N

PER CURIAM:

Plaintiffs seek a declaration that Section 36.94.230[1/] and .240[2/] of the Revised Code of Washington are unconstitutional insofar as they permit only owners of real property to divest the action of county commissioners in the formation of a Utility Local Improvement District (ULID). As non-

land owning residents within the ULID created by defendants,[3/] plaintiffs contend that their ability to vitiate the creation by protest, as could landowners, amounts to a denial of equal protection of laws under the Fourteenth Amendment. Plaintiffs also seek to enjoin defendants from proceeding with construction of the sewer system authorized for the ULID. As a second cause of action, plaintiff Jack Shouse, both a landowner and resident tenant within the ULID, contends that the statute's provision for weighting a landowner's vote in proportion to the area of land owned works a denial of equal protection by diluting the franchise of those who own small parcels.

Five issues are presented: first, whether this court has jurisdiction over the dispute; second, whether the action is barred by the thirty-day limitation period established in Section 36.94.240; third,

whether the action is barred under the principle of laches; fourth, whether the challenged statute denies non-landowners the equal protection of laws by limiting the right of divestment to property owners; and fifth, whether the weighting of votes according to land area represented denies the equal protection of laws to owners of small parcels. Our resolution of the first three issues makes unnecessary an examination of the last two.

I. JURISDICTION

Plaintiffs plead 28 U.S.C. §1331 and 42 U.S.C. §1983 in support of this court's jurisdiction. No individual plaintiff has shown that he has a claim in excess of $10,000, exclusive of interest and costs, and claims of this type may not be aggregated to reach the jurisdictional amount.[4/] Accordingly, Section 1331 does not confer jurisdiction as to any defendant. Section 1983 is not a jurisdictional

statute.

Where, however, the cause of action is predicated on Section 1983, as here, jurisdiction is conferred by 28 U.S.C. §1343 (3) as to all defendants except Pierce County. Pierce County is not a person subject to suit under Section 1983, [5/] and the action against it is dismissed with costs.

II. STATUTORY LIMITATION PERIOD

The resolution forming the ULID was adopted on June 18, 1973, and this action was filed on September 5, 1973. Defendants contend that the suit is thus barred by the thirty-day limitation period of R.C.W. 36.94.240.[6/]

Plaintiffs vigorously contend that because this is a case involving equitable relief the statutory period is inapplicable. We disagree.

The statute involved is health and welfare legislation. Substantial delays in

implementing the resolution adopted by the commissioners pursuant to it could seriously jeopardize the well-being of all of the residents within the ULID. Where a statute creates substantive rights affecting the health and well-being of a community and the legislature chooses to define the procedures for exercising those rights, the legislative scheme should not be disrupted. It is a long established principle that such statutes be given a liberal construction for the accomplishment of their objectives.[7/] The Washington legislature,in its wisdom, has determined that "no action whatsoever" challenging any proceedings under R.C.W. 36.94.240 should be maintained after thirty days following adoption of a ULID resolution. A strict application of this limitation period maximizes the public welfare purposes of the statute.

Additionally, in this era of double digit inflation, an extended delay in con-

structing the approved utility could significantly increase its cost, possibly to the extent of making it prohibitive.

None of the cases cited by plaintiffs in support of their contention that the statutory limitation period is inapplicable involved limitation periods specifically incorporated into the statue at issue so as to become an integral part thereof, as is the situation here.[8/] Where a period of limitation is part of the statute under constitutional attack, the Supreme Court has given effect thereto. In Cipriano v. Houma,[9/] the Court found unconstitutional a statute limiting the right to vote in revenue bond elections, but it limited the effect of its decision to circumstances "where, under state law, the time for challenging the election result has not expired. . . ." A similar result on the merits was reached in Phoenix v. Kolodziejski,[10/] and once again the Court limited

its holding to suits filed within the challenge period specified by the state election statute. Both of these cases were suits in equity, with the respective plaintiffs seeking only injunctive and declaratory relief. Thus, we hold that the thrity-day limitation period bars plaintiffs' claim.

Furthermore, enforcing an integrated limitation obviates the necessity of attempting to apply by analogy state statutes of general limitation varying greatly in length. Plaintiffs cite one general statute of three years and one of six years as possibly applicable. By so doing they acknowledge that Washington has no general statutory provision which would clearly and unquestionably apply here. The integrated thirty-day limitation not only applies, it simplifies and resolves the problem.

III. LACHES

Assuming, arguendo, that this case should be governed by the doctrine of laches rather than by a statutory limitation period, the result must be the same. Because the action was filed after the analogous statutory period, plaintiffs not only have the burden of excusing their delay but of establishing that delay has caused no prejudice to defendants.[11] They have done neither.[12]

IV. EQUAL PROTECTION

As indicated, we do not reach the constitutional questions. If we were to decide them, however, we would resolve them against plaintiffs. On the issue of non-landowners' rights, Field v. Barber Asphalt Paving Co.[13] would be controlling, and not the election cases cited by plaintiffs. The weighted vote question would be governed by Salyer Land Co. v. Tulare Lake Basin Storage District.[14]

This action must be dismissed as not

timely filed.[15] The Clerk shall enter Judgment for defendants, with costs.

DATED this 6th day of November, 1975.

s/ JOHN F. KILKENNY
United States Circuit Judge

s/ JOHN C. BOWEN
United States District Judge

s/ WILLIAM T. BEEKS
United States District Judge

1/ See Appendix B [RCW 36.94.230, A-16]

2/ See Appendix B [RCW 36.94.240, A-17]

3/ The ULID was created by Pierce County Resolution No. 16500.

4/ Potrero Hill Community Action Committee v. Housing Authority, 410 F.2d 974 978 (9th Cir. 1969).

5/ Kenosha v. Bruno, 412 U.S. 507,511-13 (1973).

6/ See note 2 supra.

7/ United States v. Antikamnia Chemical Co., 231 U.S. 654, 666-70 (1914); A. O. Andersen & Co. v. United States, 284 F. 542 543 (9th Cir. 1922).

8/ Czaplicki v. S/S HOEGH SILVERCLOUD, 351 U.S. 525, 533 (1956) (general tort statutes of limitation); Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 463 (1955) (no limitation period at issue); Gardner v. Panama R.R., 342 U.S. 29, 30 (1951)

(general one-year statute of limitation); Angel v. Bullington, 330 U.S. 183, 192 (1947)(no limitation period at issue); Holmberg v. Armbrecht, 327 U.S. 392, 393 (1946) (general ten-year statute of limitation); Jerome v. United States, 318 U.S. 101, 101-02 (1943) (no limitation period at issue).

9/ 395 U.S. 701, 706 (1969).

10/ 399 U.S. 204, 214 (1970).

11/ Brown v. Kayler, 273 F.2d 588, 591 (9th Cir. 1959); Shell v. Strong, 151 F.2d 909, 911 (10th Cir. 1945).

12/ The only excuse offered by plaintiffs for the delay was that their original attorney failed to timely institute the action. Deposition of John Shouse at 18.

13/ 194 U.S. 618 621 (1904).

14/ 410 U.S. 719, 734 (1973).

15/ The attorney who ably represented plaintiffs at trial did not commence the action.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACK SHOUSE, et al	)
	) Civil Action
vs.	) File No. 165-73C3
	)
PIERCE COUNTY, et al	) JUDGMENT

This action came on for trial (hearing) before the Court, Honorable John F.

Kilkenny, Circuit Judge and John C. Bowen and W. T. Beeks, United States District Judges, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that this action be and hereby is dismissed, and judgment is entered for the defendants, with costs.

Dated At Seattle, Washington, this 7th day of November, 1975.

s/ Edgar Scofield
Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACK SHOUSE, et al.,	)	
	)	
Plaintiffs,	)	NO. 165-73C3
	)	
v.	)	O R D E R
	)	
PIERCE COUNTY, et al.,	)	
	)	
Defendants.	)	
	)	

The motion of plaintiffs for retrial, reconsideration or reopening of judgment

is denied.

Plaintiffs, in denying that the statutory limitation period was applicable, injected the issue of laches into the case by discussing it in their reply brief, their supplemental trial brief and at oral argument.

Furthermore, the laches issue was not dispositive.

The opinion filed herein on November 6, 1975 shall constitute the court's findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a). The Clerk is directed to enter judgment of dismissal, with costs, in favor of defendants.

DATED this 25th day of November, 1975.

s/ JOHN F. KILKENNY
United States Circuit Judge

s/ JOHN C. BOWEN
United States District Judge

s/ WILLIAM T. BEEKS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACK SHOUSE, DAVID ROMER, E.A. BAXENDALE and ALICE M. BAXENDALE,	)	
Plaintiffs,	)	NO. 165-73C3
vs.	)	
PIERCE COUNTY, a political subdividison of the State of Washington, CLAY HUNTINGTON, PATRICK J. GALLAGHER, and GEORGE E. SHERIDAN, County Commissioner,	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jack Shouse, David Romer, E.A. Baxendale and Alice M. Baxendale, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from Judgment of Dismissal entered in this action on November 7, 1975; and the Order Denying Plaintiffs' Motion for New Trial/Reconsideration entered on November 25, 1975.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

s/ Richard B. Sanders
Attorney for Plaintiffs

[Proof of Service Omitted]

APPENDIX B

Revised Code of Washington:

36.94.230 [Pertinent language includes the following]:

Utility local improvement districts . . . may be initiated . . . by resolution of the board of county commissioners . . .

In case the board shall desire to initiate the formation of a utility local improvement district by resolution, it shall first pass a resolution declaring its intention to order such improvement, setting forth the nature and territorial extent of such proposed improvement. . . . . . .

Notice of the adoption of the resolution of intention . . . shall be published in at least two consecutive issues of a newspaper of general circulation in the proposed local district . . . . Notice of the adoption of the resolution of intention shall also be given each owner or reputed owner of any lot, tract, par-

cel of land or other property within the proposed improvement district by mailing . . . and in the case of improvements initiated by resolution, said notice shall . . . state that all persons desiring to object to the formation of the proposed district must file their written protests with the clerk of the board of county commissioners. . . .

36.94.240 [Pertinent language includes the following]:

. . . the board shall conduct a public hearing at the time and place designated in the notice to the property owners. . . .

After said hearing the commissioners shall have jurisdiction to overrule protests and proceed with any such improvement initiated by petition or resolution: Provided, That the jurisdiction of the commissioners to proceed with any improvement initiated by resolution shall be divested by protests filed with the clerk of the board prior to said public hearing

signed by the owners, according to the records of the county auditor, of at least forty percent of the area of land within the proposed local district. No action whatsoever may be maintained challenging the jurisdiction or authority of the county to proceed with the improvement and creating the utility local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless that action is served and filed no later than thirty days after the date of passage of the resolution ordering the improvement and creating the local district.

4.16.040 Actions limited to six years. Within six years:

(1) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries

thereof, or of any extraterritorial court of the United States.

(2) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

4.16.080 Actions limited to three years. Within three years:

(1) An action for waste or trepass upon real property;

(2) An action for taking, detaining, or injurying personal property, including an action for specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

4.16.130 Actions for relief not otherwise provided for. An action for relief not hereinbefore provided for, shall be com-

menced within two years after the cause of action shall have accrued.

APPENDIX C

28 United States Code:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the

Constitution, laws, or treaties of the United States.

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and

effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L 85-508, § 12(p), 72 Stat. 349.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or or an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

42 United States Code:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

APPENDIX D

United States Constitution:

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
MAR 19 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES
****

No. 75-1194
****

JACK SHOUSE, DAVID ROMER,
E. A. BAXENDALE, AND
ALICE M. BAXENDALE,

Appellants,

vs.

PIERCE COUNTY, a political subdivision of the State of Washington, CLAY HUNTINGTON, PATRICK J. GALLAGHER, and GEORGE P. SHERIDAN, County Commissioners,

Appellees.
****

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM
****

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IN THE
SUPREME COURT OF THE
UNITED STATES
****

No. 75-1194
****

JACK SHOUSE, DAVID ROMER,
E. A. BAXENDALE, AND
ALICE M. BAXENDALE,

Appellants,

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Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO AFFIRM

COMES NOW Pierce County, Washington, and the Board of County Commissioners, the Appellees herein, being represented by the

Pierce County Prosecuting Attorney, by Joseph D. Mladinov, Special Counsel thereof, and respectfully moves the United States Supreme Court to dismiss this action or, in the alternative, to affirm the judgment for dismissal entered on November 7, 1975, in accord with the opinion dated November 6, 1975, of the District Court of the United States for the Western District of Washington, sitting as a three-judge statutory court.

I.
OBJECT OF THE MOTION

The Motion to Dismiss is based upon the following:

A. The federal question sought to be reviewed was not timely raised.

1. The state statute of limitations bars this challenge.

2. In the alternative, the doctrine of laches bars this action.

The Motion to Affirm is based upon the following:

A. The federal questions were thoroughly briefed, presented and argued before the three-judge federal court and do not merit further argument.

B. The Appellants' claim is so unsubstantial as to not merit further argument.

II.
FACTS ON WHICH MOTION TO DISMSS OR, IN THE ALTERNATIVE, AFFIRM, ARE BASED

By this action four residents and electors of Pierce County, Washington, challenge the validity, under the equal protection clause of the 14th Amendment, of one provision of a comprehensive Washington statute relating to the construction and operation of sanitary sewer facilities by counties. The remedies sought are declaratory relief and a permanent injunction.

The statute permits counties to construct and operate sewer facilities, and authorizes alternative financing methods. One method is the formation of utility local improvement districts, in which the real property is assessed commensurate with the benefits which the real property will receive from the development of a public sewer system. Assessments can be used to pay all or part of construction costs.

The executive and legislative branch of Appellee Pierce County's government is a popularly elected three-member board of county commissioners. All of the Appellants are equally qualified with other residents of the county to vote for members of that board, and all did so except one who chose not to.

Under the challenged state legislation a utility local improvement district can be formed in either of two ways. If owners of 51% or more

of the land in a proposed district petition for its formation, the popularly elected board of county commissioners may either grant or deny the petition; their decision is final. Alternatively, the proposal can be initiated by the board. In the instant case the popularly elected board, following public hearings at which plaintiffs appeared and testified, unanimously resolved to form the district in issue. That district encompasses a suburban area of about 20,000 acres and 75,000 residents. The board also resolved to finance part of the construction costs of the proposed sewage collection and treatment system by assessing real property in the district, proportionate with the benefit each parcel would realize as a result of the system's construction. Half or more of the costs would, however, be paid by federal and state grants. The board's decision to pay part of the construction costs by special

assessments triggered the operation of the statutory provision under attack here, that being Section 36.94.240, Revised Code of Washington:

> The jurisdiction of the commissioners to proceed with any improvement initiated by resolution shall be divested by protests filed with the clerk of the board prior to said public hearing signed by the owners, according to the records of the county auditor, of at least forty percent of the area of land within the proposed local district.

Contrary to representations appearing in Appellants' Jurisdictional Statement, no "election" has ever been held to decide whether the district should be formed, nor have Appellants ever been denied the right to vote in any election. What did happen is that an insufficient number of property owners filed protests, as contemplated by the statute; accordingly, the popularly elected board was not "divested of its jurisdiction to proceed." Appellants complain that, not being owners of assessed property, they lacked standing under

the statute to file protests.

The general statute, of which RCW 36.94.240 is a part, has provisions akin to those in all states pertaining to the assessment of land to pay costs of local public works improvements. Such assessments differ from general ad valorem property taxes in many material ways. They are essentially charges against land specifically benefited by a public works improvement. If not paid, they create forecloseable liens. As is true of special assessment statutes in all states, the Washington statute accords standing to owners of assessed land to assert certain rights which members of the public at large do not share. Owners are entitled, for example, to challenge in court the premise that their land will actually benefit from the improvement in an amount equal to the assessment it will bear. Another right extended to the owners

is that of preventing the assessment method of financing to be used at all, in the manner described in the quoted provision. Resolution No. 16500 which established the assessment district only directed acquisition of property and construction of facilities to begin. Said resolution levies no taxes, fixes no charges, authorizes no bonds. These latter actions can be taken by a Washington county by the popularly elected board of commissioners and are not subject to any formal protest mechanism other than judicial review which is available without regard to land ownership. (RCW 36.32.330)

Appellants were allowed to present all the evidence they could muster to persuade the three-judge District Court of their proposition that, not being owners of assessed land, they were deprived of equal protection because they could not protest the district's formation. For reasons

described hereafter, the court found it unnecessary to discuss at length the questions so posed. The court considered them, however, and concluded:

> As indicated, we do not reach the constitutional questions. If we were to decide them, however, we would resolve them against plaintiffs. On the issue of non-landowners' rights Field v. Barber Asphalt Paving Co., 194 U. S. 618, 621 (1904), would be controlling, and not the election cases cited by plaintiffs. The weighted vote question would be governed by Salyer Land Co. v. Tulare Lake Basin Storage District, 410 U. S. 719, 734 (1973).

[Jurisdictional Statement, A-9.]

BRIEF IN SUPPORT OF MOTION
TO DISMISS

I. THE STATE STATUTORY LIMITATION PERIOD IS APPLICABLE

The comprehensive Washington statute governing county sewer construction and operation provides alternative mechanisms, as noted above, for forming utility local improvement districts by which real property can be assessed. The provision heretofore quoted (RCW 36.94.240) goes on to say:

> No action whatsoever may be maintained challenging the jurisdiction or authority of the county to proceed with the improvement and creating the utility local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless the action is served and filed no later than thirty days after the date of passage of the resolution ordering the improvement and creating the local district.

Pierce County's resolution 16500, creating the district in issue, was passed June 18, 1973.

This action was commenced September 5, 1973.

The three-judge district court correctly analyzed the application of the state statute of limitations to this action. Even had the court applied an alternative method of analysis, the result would have been the same.

Where the action is brought based upon a federally created right or statute, and there is no federal statute of limitations, then the appropriate state statute of limitations is applicable. International Union v. Hoosier Cardinal Corp., 383 U. S. 696 (1966). In Henry v. Ordorloso, (C.A. Pa.) 385 F.2d 491, cert. den. 390 U. S. 1016, reh. den. 391 U. S. 929 (1967), it was held that since 42 USC 1983 contains no statute of limitations (of its own) governing civil rights actions, the federal courts will apply the appropriate state statute of limitations. 42 USC 1983 is pled as the jurisdictional statute in this action.

The Appellants cite Holmberg v. Armbrecht, 327 U. S. 392 (1946), as the general rule for authority to abandon the state statute of limitations when a federal equitable remedy is requested. 2 Moore's Federal Practice, § 307(3) at p. 753-754 interprets the Holmberg case to be slightly clarified by Cope v. Anderson, 331 U. S. 461 (1947). Thus, where the equitable remedy sought is concurrent with one at law and not one solely available in equity, the federal courts will apply the same limitations as applicable in state court. At bar, Appellants seek an injunction and declaratory relief, the former being equitable and the latter being neither equitable nor legal but sui generis. Therefore, the limited rule which Appellants rely on is not applicable here because the equitable remedy sought, an injunction, is not available solely in a federal equity court but would also be available in a state court. Appellants have

filed in federal court apparently only in an attempt to evade the state statute of limitations.

II. IN THE ALTERNATIVE, THE FEDERAL DOCTRINE OF LACHES BARS THIS ACTION

It is well known that even if a state statute of limitations is not applicable, a federal court may apply it by analogy or use it in determining whether the plaintiff has inexcusably slept on his rights. Zsaplicki v. The Hoegh Silver Cloud, 351 U. S. 525 (1956), and Holmberg v. Armbrecht, 327 U. S. 392 (1946).

The Appellants offered no excuses at all for their failure to timely file this action other than neglect of their original attorney. Appellee, Pierce County, because of a State Department of Ecology directive issued on August 27, 1973, which modified the septic tank ban and ordered Pierce County to enter into engineering design contracts, has since the 5th day of September,

1973, entered into said contracts. The county has also entered into contracts for preparation of an environmental impact statement and has proceeded to attempt to arrange state and federal funding to assist with this project. Pierce County has been and will be extremely prejudiced if this case is not immediately terminated. Pierce County, state and federal agencies are anxiously awaiting the final decision on this matter in order to finalize grants which are necessary to begin construction on the first phases of this project.

The Appellants failed to prove that Pierce County would not be prejudiced because of their lack of timely filing this action. As cited by the district court opinion, the rule in several federal circuits is to place the burden on plaintiff to prove the lack of prejudice to the defendant.

III. THE APPELLANTS ARE NOW IMPROPERLY RAISING A NEW ISSUE

Appellants failed to raise the issue that RCW 36.94.240 denies equal protection of the law because it does not fairly classify persons to whom it applies. This issue was not raised during the course of the district court trial, and it should be prohibited here. Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341 (1919).

Arguendo, on the surface, this issue is without merit. RCW 36.94.240 provides that "No action whatsoever may be maintained . . ." The limitation applies to all prospective plaintiffs, and its protection is a practical necessity to protect the formation process of a special assessment district.

The Appellants imply that a 30-day statute of limitations is unreasonably short. The reasonableness of the time set forth in a statute of

limitations is determined by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Wilson v. Iseminger, 185 U. S. 55 (1902).

IV. THE ELECTION CASES ARE NOT APPLICABLE TO THE DIVESTMENT PROCEDURE UTILIZED IN THE SPECIAL ASSESSMENT DISTRICT FORMATION PROCESS

While the district court opinion did not expound on the issue of the applicability of the election cases and the weighted vote question, by dicta the judges expressed how they would decide and what cases governed.

These issues were squarely presented to the district court, were fully briefed and argued and do not merit further judicial attention. The special assessment procedures and formation

process are deeply rooted, and to permit four appellants who have failed to prove substantial hardship or injury but only possible injuries or supposed injuries (if the assessment is partially or wholly passed on to them), to tie up this court's time, is not justified.

CONCLUSION

For the foregoing reasons, this action should be dismissed or, in the alternative, the district court's decision affirmed.

Respectfully submitted,

By

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Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,

Of Attorneys for Appellees